were superseded by a federal law on the matter, by force of the Constitution itself.

The third theory seems preferable. It will result in a uniform enforcement of the first section of the amendment; the word "intoxicating" will not be credited with forty-nine possible meanings; and the states may still legislate on subjects not covered by federal statutes and consistently with Congress.[12] It may be said that for all practical purposes there is no substantial distinction between the second and third views, but theoretically the third theory gives the words their recognized legal meaning, does no violence to Article VI of the Constitution, and averts any possibility of future state laws expressly or impliedly authorizing that which Congress forbids.

REMOVAL OF CAUSES. — The plaintiff whose cause of action arises out of the negligence of an employee will usually desire to make the employer the responsible party. And he will usually be equally desirous of establishing that responsibility in his own state courts. Said Bourquin, J., in a recent case: "So long as eight of twelve jurors may render verdicts in state courts, and twelve of twelve are necessary in federal courts, plaintiffs will try to retain causes in the former courts and defendants to remove them to the latter." [1] Nor is that the sole reason actuating defendants, particularly in cases of tort where sympathy lies altogether with the other party. In federal courts material advantage may be gained from rights not available in many states: the opinion of the judge upon the facts; [2] the direction of a verdict though there be a scintilla of evidence.[3]

In order to prevent removal the practice has become familiar for the plaintiff to join the employee — when he is a fellow citizen — as co-defendant with the non-resident employer. If the interests then involved are joint the federal courts cannot acquire jurisdiction, because all the persons concerned are not competent to sue, nor liable to be sued, in those courts.[4] There may be removal, however, by such defendants as are of diverse citizenship when the interests are separable.[5] The cause is separable upon which, as against the defendants seeking removal, a distinct suit might have been brought and complete relief afforded without all of the original defendants.[6] A cause would seem always to

[12] Opinion of the Judges, 77 Leg. Int. 117 (1920).

[1] See Zigich *v.* Tuolumne Copper Mining Co., 260 Fed. 1014, 1015 (1919). See RECENT CASES, p. 985.

[2] Simmons *v.* United States, 142 U. S. 148 (1891).

[3] Ewing *v.* Goode, 78 Fed. 442 (1897).

[4] Marshall, C. J., in Strawbridge *v.* Curtis, 3 Cranch (U. S.), 267 (1806).

[5] See 18 STAT. AT L. 470.

[6] Barney *v.* Latham, 103 U. S. 205 (1880). A suit may, under correct pleading, as this case shows, embrace several distinct controversies and yet be removable in its entirety on the ground that one of them is separable from the rest. The terms "joint" and "several" are not applied to the parties defendant but to the controversies against them. Thus, when the resident employee's liability is rested solely upon non-feasance and no duty to the plaintiff is shown, the motion to remove need not raise the question of the nature of the controversy if preceded by a motion to strike out the party misjoined. See Prince *v.* Illinois Cent. Ry., 98 Fed. 1 (1899). On the other hand, the joinder of the parties being proper, a removal will be granted so long as the contro-

include separable interests, therefore, whenever the employer is made liable as codefendant with the employee solely upon the ground of *respondeat superior* and not by reason of his participation, either by presence or direction, in the negligent or wrongful act.[7] Neither is a necessary party defendant in a suit against the other.

Mere separability, however, is not enough for removal. The federal courts have often said: "A defendant has no right to say that an action shall be several which the plaintiff elects to make joint." [8] To grant a removal in *Warax* v. *Cincinnati, etc. Ry.*,[9] therefore, it was necessary to hold that the liabilities of the employer and the employee rest on such distinct grounds as to make the controversies never joint but always separable. The Georgia Court of Appeals has come to the opposite conclusion in *Postal Telegraph-Cable Co.* v. *Puckett*,[10] upon the theory that the action is joint and not several, "since the same acts of negligence are charged against both defendants" and "no act of negligence is charged against either of the defendants which is not charged against the other."

In an attempt to avoid the long-standing conflict represented by these authorities the Supreme Court relieved the confusion with a rule more confusing. For a rule of law there was laid down a rule of fact. *Alabama, etc. Ry. Co.* v. *Thompson* [11] was to the effect that the right to a removal is to be determined, not by substantive law, but from the record in the state court at the time of the application for removal. For the purposes of removal the cause of action, whether it is joint or not, is to be deemed what the plaintiff, acting in good faith, has undertaken to make it.[12] But a joinder for the sole purpose of defeating the federal

versies are not joint. Geer *v.* Mathieson Alkali Works, 190 U. S. 428 (1903). But it will not be granted if the controversy is joint. Fraser *v.* Jennison, 106 U. S. 191 (1882); Moloney *v.* Cressler, 210 Fed. 104 (1913).

[7] Beuttel *v.* Chicago, etc. Ry., 26 Fed. 50 (1885).

[8] See the opinion of Story, J., in Smith *v.* Rines, 2 Sumner (C. C. A.), 338, 348 (1836).

[9] 72 Fed. 637 (1896). The distinct nature of the controversies appears particularly in those jurisdictions where the old forms of action are retained.

[10] 101 S. E. 397 (Ga.) (1919). The question was presented to the Supreme Court in Chesapeake & Ohio Ry. *v.* Dixon, 179 U. S. 131 (1900). A Kentucky statute provided that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act . . . damages may be recovered . . . from the corporation and persons causing the same." The Court of Appeals held that a new and joint cause of action was created. The Supreme Court did not disturb this construction.

[11] 200 U. S. 206 (1906). This case raised again the issue avoided in Chesapeake & Ohio Ry. *v.* Dixon, *supra*. The court said, at 218: "Upon the face of the complaint . . . the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action. In determining this question the law looks to the case made in the pleadings. . . ."

[12] Illinois Cent. Ry. *v.* Sheegog, 215 U. S. 308 (1909); Southern Ry. *v.* Miller, 217 U. S. 209 (1910); Chicago, etc. Ry. *v.* Dowell, 229 U. S. 102 (1913). If these cases also hold that for which they are often cited, namely, that whether any controversy is joint or several is to be determined by the state court, they are utterly inconsistent with the federal practice in granting removals. In purporting to regard the record in the state court, it is the purpose of the discussion to show, the federal courts are required to hold the controversy never joint; and in granting removals for fraud they perforce ignore "the settled law of the state" that the controversy can be made joint. Consistency, however, is not to be found in the decisions. "That there is no other phase of American jurisprudence with so many refinements and subtleties, as relative

courts of jurisdiction is fraudulent and will not prevent them from deciding that the controversies are really separable.[13]

If the cause is capable of being treated either as joint or as several it is quite well established that the plaintiff may treat it as joint and his motive for so doing is immaterial.[14] There is no occasion to talk of fraud or improper motive. That issue arises only when the cause can be, not joint, only several. The cases reiterate that good faith in the pleadings will permit the cause to be retained in the state courts; that mere failure to establish a joint liability will not be ground for removal.[15] Yet knowledge is imputed where facts might have been known.[16] Taft, J., said: "Courts are not required to be blind to plain facts. The joinder of a fireman or an engineer or a conductor as defendants in an action to recover $25,000 against a railroad company, without explanation, of itself raises a suspicion that it is not done merely to recover judgment against the employees." [17] And in *Zigich* v. *Tuolumne Copper Mining Co.*[18] the court has held that it is not enough that the plaintiff believe upon reasonable grounds that the defendants are jointly liable to him, but he must set out the grounds so that the court may determine whether or not they are reasonable and sufficient to sustain the belief.

Now nothing can so sustain a belief that an action is joint as the fact that it is, and nothing can weaken that belief more than the fact that it is n't joint. This is practically the test of fraud to be found in the cases. But because improper motive becomes material only when the complaint alleges to be joint controversies which in point of law cannot be, it would seem that in granting a removal the courts must first decide that the non-resident employer is not an essential codefendant with the resident employee. Having held the cause separable, there is no reason to talk of fraud.

RULE AND DISCRETION IN THE ADMINISTRATION OF JUSTICE. — The last two decades have witnessed a series of persistent attacks upon the administration of justice by the courts. The courts of the nineteenth century were unyielding in their faith that justice must be administered in accordance with fixed rules, which could be applied by a rather mechanical process of logical reasoning to a given state of facts and made to produce an inevitable result.[1] One phase of the reaction against this

to removal proceedings, is known by all who have to deal with them." McPherson, J., in Hagerla *v.* Mississippi River Power Co., 202 Fed. 771, 773 (1912). This criticism has been made by Mr. Charles A. Boston in "Removal of Suits from State to United States Courts — A Picture of Chaos Demanding a Remedy," 88 CENT. L. JOURN. 246.

[13] Wecker *v.* National Enameling Co., 204 U. S. 176 (1907).

[14] Chicago, etc. Ry. *v.* Willard, 220 U. S. 413 (1911); Chicago, etc. Ry. *v.* Schwyhart, 227 U. S. 184 (1913); Chicago, etc. Ry. *v.* Whiteaker, 239 U. S. 421 (1915).

[15] Whitcomb *v.* Smithson, 175 U. S. 635 (1900); Kansas City, etc. Ry. *v.* Herman, 187 U. S. 63 (1902).

[16] Wecker *v.* National Enameling Co., *supra*, where, at 185, the court said that "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." This approaches perilously near to "constructive fraud."

[17] See Powers *v.* Chesapeake & Ohio Ry., 65 Fed. 129, 131 (1895).

[18] 260 Fed. 1014 (1919).

[1] See Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.